

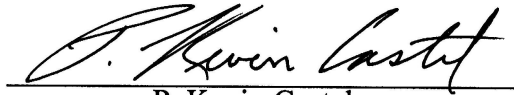
April 30, 2020

Via ECF

Plaintiff shall file a proposed final judgment by May 5. The government shall respond by May 7.

Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007

SO ORDERED.
May 1, 2020.


P. Kevin Castel
United States District Judge

Re: *Natural Resources Defense Council, et al. v. U.S. EPA*, No. 18-cv-11227 (PKC)

Dear Judge Castel:

Plaintiffs Natural Resources Defense Council and Environmental Defense Fund (“Plaintiffs”) write pursuant to Local Civil Rule 58.1 regarding the production date to accompany the final judgment in this FOIA matter. Plaintiffs respectfully request that upon issuance of the appellate mandate this Court enter a final judgment that includes an order directing Defendant United States Environmental Protection Agency (“EPA”) to produce the remaining withheld record no later than 10 calendar days after the mandate issues.

Plaintiffs are awaiting entry of judgment in their favor and EPA’s production of the record at issue pursuant to an April 1, 2020 decision of the United States Court of Appeals for the Second Circuit. App. Dkts. 73–1, 80.¹ The Second Circuit adjudged that EPA is improperly withholding a component of its OMEGA model, the v.1.4.59 “core model” computer program, and remanded the case with instructions to this Court to enter summary judgment for Plaintiffs. App. Dkt. 73–1, at 20; ECF 62.

On April 10, Plaintiffs moved the Second Circuit to expedite issuance of the mandate. App. Dkt. 81–2, at 1–3. Plaintiffs believe that the computer program and its calculations will shed important light on a significant government action to weaken emission standards. This action is slated to be published in the Federal

¹ “App. Dkt.” refers to the Court of Appeals docket numbers in No. 19-2896 (2d Cir.).

Register today, April 30,² which starts a 60-day clock for the public to petition for administrative reconsideration. *See* 42 U.S.C. § 7607(b)(1), (d)(7)(B). That clock runs against the default timeline for issuance of the mandate, which will issue (at the earliest) on May 26.

The Second Circuit declined to expedite its mandate on the grounds that the government needs the period prior to the issuance of the mandate to have a meaningful opportunity to deliberate about whether to seek rehearing. *See* App. Dkt. 90, at 1-2. But the Second Circuit acknowledged that Plaintiffs' timing "concern is legitimate." *Id.* at 1. The court further stated that, although "the government not infrequently moves for *additional* time" to make its rehearing determination, "[i]n light of the interests cited by [Plaintiffs]," "the government is cautioned that it is unlikely [to grant] any request for an extension." *Id.* at 2.

Thus, as the Second Circuit recognized, the public has a "legitimate" interest in timely release of the record at issue. Even for routine FOIA requests, the statute requires the agency to make records "promptly available" to the public. 5 U.S.C. § 552(a)(3)(A); *see, e.g., Bloomberg L.P. v. Bd. of Governors of Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 282 (S.D.N.Y. 2009) (Preska, C.J.) (ordering production of improperly withheld records within five business days). The contemporaneous publication here of a major public health action counsels strongly in favor of eliminating any unnecessary delay in release.

Accordingly, Plaintiffs respectfully request that the Court enter final judgment upon issuance of the appellate mandate and include therewith an order directing EPA to produce the v.1.4.59 OMEGA core model no later than 10 calendar days after the mandate issues. EPA consents to this request, assuming that (1) the Second Circuit's April 1 order and judgment are unchanged, and (2) this Court enters final judgment after its jurisdiction is restored.

* * * * *

² *See* <https://www.federalregister.gov/documents/2020/04/30/2020-06967/the-safer-affordable-fuel-efficient-safe-vehicles-rule-for-model-years-2021-2026-passenger-cars-and> (last visited April 30, 2020).

Thank you for your consideration of this matter.

Respectfully submitted,

/s/Pete Huffman

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cc: Counsel of record (via ECF)